Phones that are too ‘smart’ for the law?

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Smart idea: But does the phone meet IPR standards? - Photo: KR Deepak

The existing systems can handle IPR issues arising out of smartphone standards. But an informed legal response is in order

The Government continues to roll out elaborate plans to boost manufacturing in India, including in the vital ICT sector, and work towards making India’s IPR regime friendly towards investors and innovators. Since technological advancement is a proven driver of economic growth, the Government should incentivise innovation to ensure the ‘Make in India’ and ‘Digital India’ initiatives are successful in the long run.

The emphasis, in the context of the telecom sector which has a big role to play, should be on promoting actual manufacturing of devices, rather than assembling completely built units (CBU) or completely knocked down (CKD) units that are imported into the country.

The department of industrial policy and promotion (DIPP) under the commerce and industry ministry recently shared a discussion paper on standard essential patents (SEPs) and their availability on fair, reasonable and non-discriminatory (FRAND) terms. The objective of this discussion paper is to engage stakeholders to deliberate on the functioning of standard setting organisations (SSOs) and obligations of licensors and the licensees of SEPs. Standards make products interoperable and ensure use of complementary patents embedded in critical technologies. The use of SEPs is indispensible to making a non-infringing device compliant to a standard, which would later get adopted by the entire industry. Here, SSOs play a crucial role. Their overarching responsibilities include coordinating the standard setting process and ensuring that once a standard has been accepted, SEPs in the standard must be provided at FRAND rates to interested and willing licensees.

A question of balance

Courts around the world have struggled to balance grant of patents and public interest at large. In lieu of SEP holders' commitment to offer their patents on FRAND terms, they expect to obtain royalties from all licensees. This is often a contentious issue. Through this discussion paper, the department has highlighted some of the thorny patent and competition issues around the working of an SSO, licensing of SEPs, royalty determination, remedies in case of disputes, and appropriate regulatory frameworks, among others.

This paper assumes importance in the context of a slew of litigations involving Indian companies such as Micromax, Intex and iBall, which are trying to become global smartphone manufacturers, and Ericsson, a Swedish technology giant and holder of several patents essential in a variety of communication standards. DIPP has laid down some issues that have already gathered momentum in India and abroad, and raised 13 questions for deliberation. The paper also reflects upon the recent interactions between the Competition Commission of India (CCI) and the judiciary. In recent judgments, the Delhi High Court has stayed all orders passed by the CCI, including its findings on the abuse of dominance of the SEP holder.

Steps taken by regulatory agencies should be market-supporting to induce meaningful innovation activity, which can enhance social welfare. In this context, some of the questions raised by DIPP merit attention, especially those pertaining to creation of additional bodies to determine FRAND terms.

Terms of agreement

Membership of technology providers in SSOs is on a voluntary basis, and the commitments made by them to license their patents on FRAND terms are made under a private contract between the standards body and the members. As a result, laws governing patents and contracts

in India are relied upon to settle disputes between the technology providers and the technology implementers. This is similar to what happens in the US where the courts are the definitive authority to preside over matters pertaining to patent licensing on FRAND terms. There is no such need of setting up an additional body to determine FRAND terms for patents relevant to a standard.

Moreover, standards bodies, spread across countries, differ from one another in the composition of members, the technology underlying the standard, and the IPR policies meant to safeguard the interests of patent licensors as well as the licensees. Defining the contours of an arrangement between parties, including FRAND terms of licensing of patents essential to the standard, ought to be left to the respective SSOs, which are cognisant of the intricacies of the technology and the needs of the industry.

To avoid significant transaction costs, the contracting parties in a dispute can also enter into private negotiations to strike a licensing deal or to resolve disputes outside the court system. Surely, experts from different fields can provide inputs, based on sound legal reasoning and thorough economic analysis, to inform us about different methods that can be used to quantitatively determine royalty rates.

Towards maturity

However, the crucial point is that private licensing arrangement for patents result from bilateral negotiations on the basis of the private market for the underlying technology.

Such arrangements do not seem outside the purview of our existing systems and established frameworks.

This is especially true in determining royalties for SEPs which, in line with the classical canon of economics of price control, can potentially create deadweight loss.

Given that the Indian smartphone industry is battling multiple challenges on SEPs, some of which are still in court, avoiding adding more layers is imperative; fine-tuning the ones we already have in place is the need of the hour.

The jurisprudence in Europe and the US, two regions that have seen several complex SEP-related matters come up in the past 10 years, is relatively more mature and comprehensive, even though the nature of these issues is such that the jurisprudence will keep evolving. In comparison, courts in India can perhaps offer a more detailed and coherent analysis in their verdicts.

Nevertheless, judicial and quasi-judicial bodies in India, and elsewhere, have been looking into matters ranging from assessing patent infringements, assigning monetary damages and other appropriate rewards to granting injunctive relief, where necessary, and determining royalty rates.

The Government's role in prescribing terms of what are private agreements meant for purely commercial purposes, could possibly become a matter of concern for innovators and investors.

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Published on April 10, 2016

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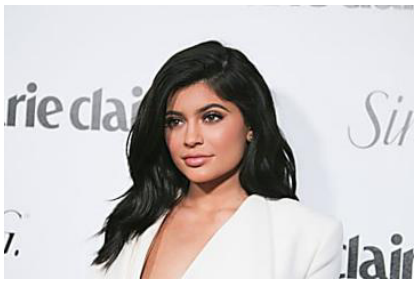

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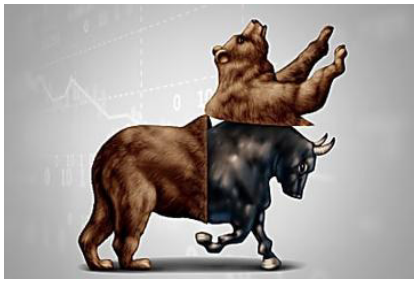

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